IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 78-1756

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Claims

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME
and
BRIEF
of
CHLOE WHISKERS, ET AL., AS AMICI CURIAE

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MOTION FOR LEAVE TO FILE BRIEF OF
AMICI CURIAE OUT OF TIME

Chloe Whiskers, et al., the plaintiffs in Whiskers v. United States, 600 F.2d 1332 (10th Cir. 1979), move the Court for leave to file the attached brief as amici curiae in this proceeding. Consent of the parties has been sought. Respondents have consented, but the United States has refused to consent.

Amici consist of a class of largely impoverished southern Paiute Indians, most of whom live in desert regions of Utah and Nevada. Their interest arises from the cited decision, which raises an issue very similar to the question under review here, albeit under a different substantive statute. Amici are preparing to petition for review of that decision.

This motion should be granted despite its late submission for the following reasons:

1. Amici discuss a material point on which they disagree with the briefs of both parties. Their view may assist the Court, and the need to state it was not known until the parties' briefs were already on file.

2. The point briefed is by its nature already covered in the brief of the adverse party, the United States. Therefore there is no prejudice from the late filing.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

INTEREST OF AMICI

The interest of amici curiae is set out in the Motion for Leave to File Brief of Amici Curiae, ante at i.

ARGUMENT

THE TUCKER ACT GRANTS THE CONSENT OF THE UNITED STATES TO BE SUED FOR BREACH OF A STATUTORY TRUST, AND THE SOLE ISSUE HERE IS WHETHER PLAINTIFFS HAVE MADE OUT A CAUSE OF ACTION TO RECOVER MONEY DAMAGES AGAINST THE UNITED STATES UNDER THE STATUTES

The court below correctly defined the issue in this case as whether 28 U.S.C. 1491 embraces actions against the United States for breach of a statutory trust. Some passages in the United States' brief attempt to equate this issue with the distinct question of consent of the United States to be sued. Pet. Br. 11-21. Respondents do not dispute that characterization. See, Resp. Br. 14-45. Amici urge that the history and language of the Tucker Act and decisions of the courts interpreting it make clear that by the Tucker Act the United States consents to be sued in actions founded on a statute. The only valid inquiry here is whether there is a cause of action for damages

against the United States under the particular statutes at issue.[1]

The Court of Claims was created in 1855. 10 Stat. 612. Though called a court, its function was only to investigate claims against the United States "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States" and to report its findings and recommendations to Congress. Id. §§ 2, 7. In 1863 the Court was empowered to render final judgments, from which appeals to this Court could be taken. 12 Stat. 765. There is no published legislative history of these acts bearing on the instant case.[2]

1/ On this point amici agree with the decision of the Court of Claims for the reasons stated in its opinion. Also, the Court in United States v. Mason, 412 U.S. 391 (1973), decided an Indian's breach of trust claim on the merits, noting that jurisdiction was based on the Tucker Act. 412 U.S. at 394 n.5. Jurisdiction had been adjudicated in the Court of Claims, but the United States abandoned the issue before this Court.

2/ H.R. Rep. No. 1077, 49th Cong., 1st Sess. (1886), the report that accompanied Rep. Tucker's bill (H.R. 6974), contained lengthy excerpts from an article by the Chief Justice of the Court of Claims in Southern Law Review of March 1882, giving the history of the court from its origin and discussing Congress's consideration of the 1855 and 1863 Acts.

In 1886 Representative Tucker of Virginia, chairman of the House Judiciary Committee, introduced the bill which became the Act of that name, H.R. 6974, 49th Cong., 1st Sess. (1886). The history of the Act makes it clear that all concerned viewed the Act as a substantive waiver of the United States' sovereign immunity in favor of the "honest private claims" of the citizenry. H.R. Rep. No. 1077, 49th Cong., 1st Sess. 4 (1886).

The Act itself was entitled "An Act to provide for the bringing of suits against the United States." Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (1887). It effected a complete overhaul of the Court of Claims organization and procedure and broadened the jurisdictional grant to include claims "for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable...." Id. § 1.[3] The committee believed this phrase

3/ In the 1948 revision of 28 U.S.C., 62 Stat. 940, the codifiers omitted from § 1491 (§ 1 of the Tucker Act) the language following "cases not sounding in tort," which had been in the statute since the Act was passed in 1887. See 28 U.S.C. 1491. The legislative history, H.R. Rep. 308, 80th Cong., 1st Sess. 138 (1947)(reprinted at 28 U.S.C.A. 1491 Reviser's Note), states that the language was viewed as surplusage:

embraced "a large class of cases," H.R. Rep. No. 1077, id., at 3.[4/] The title and language of the bill sufficiently demonstrate that one of its principal purposes was to waive the Government's immunity. The debates in the House leave no room for further doubt. When the bill was first considered on January 13, 1887, the following exchange occurred between Rep. Tucker and Rep. Reed:

> MR. REED. Is the bill sufficiently broad to cover all claims against the United States? Does it give the right to sue the United States in all cases?
>
> MR. TUCKER. Not in all cases.
>
> MR. REED. I mean in all cases where there is a claim of right in law or equity, technically so called.

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3 cont'd/ [The] [w]ords "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable" were omitted as unnecessary since the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action...." That change, of course, had no impact on the scope or effect of the Act.

4/ The bill on which the committee reported, H.R. 6974, did not contain the language "in cases not sounding in tort." See e. g. 18 Cong. Rec. 623 (1887). That addition was made on the Senate floor, Id. at 2175. Presumably, the "large class of cases" was substantially diminished by the exclusion of tort cases.

> MR. TUCKER. Yes; equity and admiralty. The only cases not provided for are suits upon the use of a patent right by the Government and suits in reference to captured and abandoned property which are now barred by the statutes of limitations. This bill extends the jurisdiction of the Court of Claims to all cases which arise, not only ex contractu but ex delicto, and to cases in admiralty, so that it will take the whole mass of these claims away from Congress.
>
> * * *
>
> MR. REED. As this is a somewhat long bill, I desire to ask another question. As I understand, the effect of the bill is that the United States can be made a party defendant in any suit where an individual could be made a party defendant.
>
> MR. TUCKER. Yes, sir.

18 Cong.Rec. 622 (1887). Two months later, after the Senate had passed the final version of the bill and it was before the House for final action, Rep. Townshend of Illinois spoke in opposition to it, saying that "If this bill should pass it will make the government a defendant in nearly all cases where a private citizen could...." 18 Cong.Rec. 2679 (1887). Rep. Bayne concluded the debate, urging that the bill pass so as to

> give the people of the United States what every civilized nation of the world has already done -- the right to go into the courts and seek redress against the government for their grievances.

Id. at 2680. Moments later the Tucker Act became law.

This Court first considered the scope of the Tucker Act's jurisdictional provision in United States v. Jones, 131 U.S. 1 (1889), and there held that it did not include suits for equitable relief only.[5/] The Court described the issue before it as being the extent to which the legislature had subjected "government itself, equally with individuals, to the jurisdiction of its own courts...." Id. at 19.

Later opinions of the Court have consistently recognized that the Tucker Act, and its predecessor acts, constituted waivers of the government's sovereign immunity. For example, in Dalehite v. United States, 346 U.S. 15, 26 n.10 (1953), the Court said:

> In 1855, Congress established the Court of Claims and consented to suit therein on claims based on contract or federal law or regulation. This consent was enlarged in 1887 to include all cases for damages not sounding in tort.

To the same effect is Soriano v. United States, 352 U.S. 270, 273 (1957).

The Court's most extensive discussion of the consent-to-suit aspect of the Tucker Act was in United States v. Sherwood, 312 U.S. 584 (1941). Sherwood involved the question whether under the

5/ See United States v. King, 395 U.S. 1 (1969), in which the Court held the Court of Claims had no jurisdiction to grant relief under the Declaratory Judgment Act, 28 U.S.C. § 2201.

Tucker Act, a judgment creditor could sue the United States as subrogee of his debtor's claim against the United States for breach of contract. In answering the question in the negative, the Court examined the Tucker Act carefully, saying (at 590):

> The section must be interpreted in light of its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted.

Numerous other passages throughout the opinion in Sherwood refer to the Tucker Act as "a waiver of sovereign immunity," id., "the Government's consent to be sued," id. at 591, 592, and comparable terms. Sherwood is so clear on this point that no other authority should be necessary to establish that the Tucker Act constitutes both a grant of jurisdiction and a waiver of sovereign immunity for those cases within its terms. Numerous other authorities may be found, however, throughout the body of federal case law.[6/] And see 14 Wright & Miller, Federal

6/ Porter v. United States, 496 F.2d 583, 586 (Ct. Cl. 1974); Pasha v. United States, 484 F.2d 630, 633 (7th Cir. 1973); Konecny v. United States, 388 F.2d 59, 62 (8th Cir. 1967); Jacobsen v. Tahoe Regional Planning Agency, 558 F.2d 928, 940 (9th Cir. 1977); Whiskers v. United States, 600 F.2d 1332, 1335 (10th Cir. 1979); International Engineering Co. v. Richardson, 512 F.2d 573, 577 (D.C. Cir. 1975); Nelson v. United States, 341 F.Supp. 1353, 1354 (D. Mont. 1972); Vigil v. United States, 293 F.Supp. 1176 (D. Colo. 1968); Jentry v. United States, 73 F.Supp. 899, 901 (S.D. Cal. 1947); McMichael v. United States, 63 F.Supp. 598, 599 N.D. Ala. 1945).

Practice and Procedure, § 3656, p. 202 (1976):

> Probably the two best-known exceptions to the sovereign immunity doctrine are the Tucker Act and the Federal Tort Claims Act.

It is abundantly clear that from its enactment forward the Tucker Act has been viewed as granting the consent of the United States to be sued in those categories of cases therein enumerated. Were that not so, there would be no other way for contract claims to be brought against the United States. If the Act does not grant the Government's consent to be sued on such claims, the claims cannot be entertained. No federal contract grants consent, nor does any federal contracting officer have the authority to waive the government's immunity. Henninger v. United States, 473 F.2d 814, 816 (9th Cir. 1973). The same is true of claims founded upon "any regulation of an executive department," 28 U.S.C. 1491.

The source of confusion on what had been settled law is a few passages in the Court's decision in United States v. Testan, 424 U.S. 392 (1976). Testan has caused difficulty for some lower courts.[7/]

7/ See, e.g., State of Texas v. United States, 537 F.2d 466, 473 (Ct.Cl. 1976), concurring opinion of Nichols, J. Several federal courts of appeals have held, on the strength of Testan alone, that the Tucker Act is not a consent to suit. Johnson v. Mathews, 539 F.2d 1111, 1122 (8th Cir. 1976); Tatum v. Mathews, 541 F.2d 161, 165 (6th Cir. 1976); Fitzgerald v. United States Civil Svc. Comm'n, 554 F.2d 1186, 1189 (D.C.

While the decision is releyant to the instant case, it did not rewrite the Tucker Act.

Before this Court, the Testan plaintiffs argued that the Tucker Act waived sovereign immunity and granted jurisdiction over every claim that a substantive right created by federal statute had been violated. The Court disagreed, holding that only statutes (or regulations) that clearly mandate payment of money to identifiable persons or groups give rise to a cause of action for damages against the United States. The opinion established a relatively strict standard, taken from Eastport S.S. Corp. v. United States, 372 F.2d 1002 (Ct.Cl. 1967), for determining which statutes should be held to establish such causes of action.

Essential to the Court's ruling was the distinction between subject matter jurisdiction over a claim, waiver of sovereign immunity, and the existence of a cause of action.[8/] The Tucker Act describes certain types of causes of actions against the United States,

7 cont'd/ Cir. 1977); Hill v. United States, 571 F.2d 1098, 1101 (9th Cir. 1978); Polos v. United States, 556 F.2d 903, 906 (8th Cir. 1977); McCulloch Gas Processing Corp. v. Canadian Hydrogas Resources, Ltd., 577 F.2d 712, 716-17 (E.Ct. of App. 1978).

8/ The jurisdiction/cause of action distinction is discussed at length in Cort v. Ash, 422 U.S. 66 (1975). And see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

for which it confers jurisdiction on the Court of Claims (and the district courts for claims for less than $10,000) and waives the government's immunity from suit. The jurisdictional grant and the waiver of immunity are completely congruent; as stated in United States v. Sherwood, supra, (312 U.S. at 591):

> This matter is not one of procedure but of jurisdiction, whose limits are marked by the Government's consent to be sued.

And see United States v. Testan, supra 424 U.S. at 399, quoting Sherwood. The determination of what causes of action fall within those limits can be a more detailed inquiry. Contract claims constitute a reasonably clear category, but claims "for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491, do not. The Court of Claims once referred to that phrase as an "amorphous and unfamiliar part of our jurisdiction." Eastport S.S. Corp. v. United States, supra, 372 F.2d at 1013.[9/] Testan involved the question of when a Tucker Act claim may properly deemed "founded upon an Act of Congress." The Court said that the "grant of a right of action must be made with specificity," 424 U.S.

9/ But see United States v. Cornell Steamboat Co., 202 U.S. 184 (1906), where jurisdiction over a libel for salvage was sustained on the basis of that provision.

at 400, and the Court found no such cause of action in the statutes at issue. See Duarte v. United States, 532 F.2d 850 (2d Cir. 1976).

The language of the opinion, however, is asserted by the Government to mean that the Tucker Act does not waive sovereign immunity at all, and that for an Act of Congress to give rise to a claim for damages against the United States that Act must not only intend a cause of action but must separately and distinctly contain a waiver of sovereign immunity. The error of that interpretation is apparent when considered in light of claims founded upon contracts and regulations. Cf. Neely v. United States, 554 F.2d 114, 115 (3d Cir. 1977). Even in the context of acts of Congress, it would preclude virtually all claims, since Congress does not normally add waivers of sovereign immunity to its enactments. Respondents' Brief (at 14-41), provides an example of the confusion and uncertainties that would be erroneously introduced into the field of Tucker Act litigation, should the reading given Testan by the Government here be accepted by the Court. Amici submit that acceptance of this view of Testan would set litigation in the Court of Claims back 125 years. Sovereign immunity may be a time-honored doctrine, but there is no need today for it to be restored to the position it occupied in 1855.

CONCLUSION

For the reasons stated, the decision of the Court of Claims should be affirmed.

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